No. 70-82

# In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, APPELLANT

*v.*

TOPCO ASSOCIATES, INC.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*

**BRIEF FOR THE UNITED STATES**

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## CITATIONS

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## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the district court, its findings of fact and conclusions of law (A. 545-567),[1] are reported at 319 F. Supp. 1031.

### JURISDICTION

The judgment of the district court (A. 568) was entered on November 16, 1970. A notice of appeal (A. 569) was filed by the United States on January 15, 1971, and probable jurisdiction was noted on April 19,

[1] "A" refers to the joint appendix; "F" refers to the findings of fact of the district court; "GX" refers to government exhibits; "DX" refers to defendant's exhibits; and "Tr." refers to the trial transcript.

1971 (A. 570). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365; *United States* v. *Sealy, Inc.*, 388 U.S. 350; *United States* v. *General Motors Corp.*, 384 U.S. 127.

## QUESTIONS PRESENTED

1. Whether the assignment of exclusive marketing territories by agreement among actual or potential competitors is illegal *per se* under Section 1 of the Sherman Act.

2. Whether a prohibition, agreed to among actual or potential competitors, against reselling at wholesale of private label grocery products as to which title has passed is illegal *per se* under Section 1 of the Sherman Act.

## STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in relevant part:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

## STATEMENT

On January 15, 1968, the United States filed a civil complaint against Topco Associates, Inc. ("Topco") charging a violation of Section 1 of the Sherman Act. The complaint alleged a combination and conspiracy among Topco and its owner-member supermarket chains, who were named as co-conspirators, to allocate

exclusive marketing territories in the sale of Topco-branded grocery and related non-food products. After trial, the district court held that the Act had not been violated and entered judgment for defendant, dismissing the complaint.

### A. TOPCO ORGANIZATION AND OPERATIONS

Topco was founded in 1944 as Food Cooperative, Inc. From its inception, it has been a non-profit marketing corporation, wholly owned and controlled by "member" supermarket chains. The owner-chains, currently 25, are independent companies, operating under separate management and corporate names (F. 2, A. 554). The common stock of Topco is divided equally among the member firms (F. 15, 16, A. 557–558).[2] Topco is managed by a board of 14 directors, who elect officers and committee members. Of the 28 persons who served as directors of Topco between 1960 and 1967, each contemporaneously served as a principal executive officer of a member firm (F. 17, 18, A. 558).

Topco serves as a common purchasing agency for these firms, procuring and distributing on an exclusive basis more than 1000 different food and related non-food products. The majority of these products are dis-

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[2] As a condition of membership, each Topco member firm is required to purchase the two outstanding classes of Topco stock: voting common and non-voting preferred. The common stock is equally divided among the member firms, while the number of preferred shares a member is required to purchase is determined on the basis of the member's total retail sales (F. 15, 16, A. 557–558).

tributed under various brand names owned by Topco (F. 4, A. 554-555; GX-1, A. 368-369).[3]

The retail value of all products and supplies procured for its members by Topco during 1968 was $237 million, about 10 percent of their total sales. The value of products bearing Topco-owned brands was approximately $134 million, or 6 percent of total sales (F. 10, A. 556). The percentage of sales of certain important staple and high-volume grocery items supplied by Topco, such as frozen foods and beverages, is markedly higher, in some instances exceeding 70 percent of total sales of such products (F. 27, A. 561; DX-1, A. 493; DX-2, A. 499-500).[4]

Topco does not maintain manufacturing, processing or warehousing facilities, and it does not engage in independent product advertising or promotion. Products it obtains are usually shipped directly from the packer or manufacturer to the member. The members are charged an amount that is the same as or close to Topco's cost; they pay either Topco or the supplier. Topco's operating expenses are supported principally by annual assessments of the members, based upon their gross sales (F. 14, A. 557).

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[3] Topco members purchase other products, including nationally advertised brands, independently through other sources (F. 5, A. 555).

[4] The president of Penn-Fruit Company, a Topco member operating principally in Philadelphia and Baltimore, estimated that grocery sales were about 65 percent of Penn-Fruit's total sales, and that Topco products accounted for more than 50 percent of canned fruits and vegetables, more than 70 percent of frozen foods and more than 70 percent of canned carbonated beverages (A. 234-235; F. 27, A. 561).

## B. TOPCO'S MEMBERSHIP

All but two of the Topco member firms operate regional supermarket chains.[6] Together, the members own approximately 1000 stores in 33 states (F. 2, 3, A. 554). In 1964 Topco member chains had combined retail sales of more than $2 billion. This figure had increased to more than $2.3 billion by 1967, placing Topco members fourth in the United States in aggregate retail sales behind the three largest grocery chains, A&P, Safeway and Kroger (F. 9, A. 556).

Nearly all Topco owner-members rank among the largest 75 grocery chains in the country. Included among its members in 1964 were subsidiaries or divisions of three of the 20 largest food chains in the nation and six of the 40 largest chains (DX-1, A. 483). In 1967 Topco members included Star Market Company, a division of the Jewel Companies, the sixth largest chain in the country, and Eagle Food Centers, Inc., a subsidiary of Lucky Stores, the eleventh largest food chain (Pretrial Stipulation Appendix A, A. 17-19).

Topco members are frequently a dominant retail grocery chain in their respective marketing areas. For example, in 1960, Giant Food, Inc. (which resigned from Topco in 1966), had 23 percent of the retail grocery sales in the District of Columbia; Big Bear Stores, Inc., had more than 33 percent of the Columbus, Ohio, market; and Fred Meyer, Inc., had 21 per-

[6] The Twin Ports Grocery Company and Frankford-Quaker Grocery Company distribute products only at wholesale. (Pretrial Stipulation, ¶ 31, A. 16; A. 119; Tr. 625, 634-635).

cent of the market in Portland, Oregon (GX–52, A. 418–419; see also, A. 266–267, 288, 301).

Member chains are dispersed geographically (F. 13, A. 557), although there have frequently been significant overlaps in marketing territories (GX–50, A. 409–411; GX–52–54, A. 412–422; GX–61, A. 423–424; GX–65, A. 425; A. 93, 98, 239, 295–298). In 1965 seven Topco members, with total sales in excess of $560 million, were located within the Boston-Washington corridor, and six members, with combined sales of $830 million, were located within a 200 mile radius of Chicago (GX–104; Pretrial Stipulation, Appendix B, 20–21).[6]

### C. TOPCO LICENSE RESTRICTIONS

1. *Territorial restrictions.* Each member firm is required to execute a "Membership and Licensing Agreement" embodying the provisions of the Topco Articles of Incorporation and Bylaws.[7] The agreement designates the territories, usually by counties, in which the member may sell specified Topco trade-

[6] With the exception of Fred Meyer, Inc., which operates in the Northwest, each member's territory is proximate to a state in which one or more other members operate. For example, two members operate in New Jersey and Eastern Pennsylvania (one also operates in Maryland); three operate in Western Pennsylvania, Ohio, West Virginia, Kentucky, and Southern Indiana; four operate in Illinois, Wisconsin, Iowa, and Nebraska; four operate in Louisiana, Arkansas, East Texas, Mississippi and Alabama; and two operate in Arizona and New Mexico (GX–17, GX–45, GX–68).

[7] Topco may terminate the membership of any member who violates any agreement between it and Topco, or any provisions of the corporate articles or bylaws (F. 40, A. 563).

marked products. The territories frequently include large areas where members do not presently operate stores (F. 48, A. 665).

Article IX, Section 2, of the Topco Bylaws establishes three categories of territorial licenses (GX-5, A. 395-396):

> (a) *Exclusive*—An exclusive territory is one in which the member is licensed to sell all products bearing specified trademarks of the Association, to the exclusion of all other persons.
>
> (b) *Non-exclusive*—A non-exclusive territory is one in which a member is licensed to sell all products bearing specified trademarks of the Association, but not to the exclusion of others who may also be licensed to sell products bearing the same trademarks of the Association in the same territory.
>
> (c) *Coextensive*—A coextensive territory is one in which two (2) or more members are licensed to sell all products bearing specified trademarks of the Association to the exclusion of all other persons. * * *

No member may sell Topco-label products outside its licensed market area, regardless of the category of license it holds (F. 40, A. 563). Most licenses are exclusive, and, as the district court found, "[h]istorically, even co-extensive and non-exclusive licenses have tended to be *de facto* exclusive * * *" (F. 43, A. 564; see, also, A. 100-102 ,105-106, 108-109).

Prospective members must submit an application to the Topco board of directors indicating the geographic areas in which they maintain retail grocery outlets and the type of license they desire. Approval by the

board and an affirmative vote of 75 percent of the membership ordinarily is necessary to admit the new member. If, however, the member whose operations are nearest to the applicant, or any member within 100 miles, objects, an affirmative vote of 85 percent of the membership is necessary. (GX-5, A. 375-376).[6]

Member expansion into another member's existing territory is, in practice, permitted only with the other member's consent (F. 44, A. 564). This has effectively foreclosed the entrance of Topco member chains into the "territory" of other members (A. 100-102, 225-226, 242-243, 317-318).

Members can theoretically expand without Topco products by substituting other brands for them. But such expansion is impractical. Once a member has committed itself to the full Topco program of strategic staple items for most of its stores, it is ordinarily not feasible for it to maintain a dual inventory of comparable non-Topco products for its other stores (GX-102, A. 438-439). Thus, only 51 of approximately 1,000 supermarkets owned by Topco members, five percent, were operated outside Topco licensed territories in 1967 (Pretrial Stipulation, ¶ 17; F. 57, A. 566).

Topco members periodically advise the board of directors of their intent to expand into new territories

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[6] In one instance, the Benner Tea Company, during its unsuccessful application for membership, offered to close or sell its supermarket located within the exclusive territory of Eagle Food Centers, Inc., in an effort to avoid the opposition of that Topco member (GX-97, A. 435-436; GX-98, A. 437-438).

or to request a territorial license for new market areas. These notices are compiled by the board and circulated among the membership (GX-56; GX-72, A. 429-433; GX-73-74, GX-115). This allows affected chains an opportunity to object to any other member's expansion plans (GX-71, A. 428).

Topco has, at various times, created territory and territory policy committees [9] to resolve territorial conflicts among members and to negotiate changes in territories.[10] These committees have been composed of

[9] The first committee was created in 1961 (GX-5, A. 406-408; GX-14, GX-52, A. 412-416; A. 95). A 1962 committee created by amendment to the by-laws was empowered to recommend to the directors the changing of fringe territories from exclusive to non-exclusive or coextensive; it could not act with respect to so-called "prime territories," however (GX-5, A. 396-398; GX-52, A. 417). Since 1966, the consent of the member affected has been required before territories are altered (A. 68-69, 72-73; GX-5, A. 397). A territory committee created in 1965 and enlarged in 1966 has focused primarily upon granting requests that members' non-exclusive or coextensive counties be changed to exclusive, although, in some cases, the applicant operated only one or even no store in an area (A. 128; GX-50, A. 409-411; GX-68, A. 426-427; GX-104, A. 442-443).

[10] For example, ACF-Wrigley's license to retail certain Topco products in Lucas County, Ohio was expressly conditioned on the consent of Big Bear Stores (GX-56). Schultz Sav-O Stores was consulted in connection with the request of American Community Stores to sell Topco products in Milwaukee County; Schultz did not object and American was "authorized" but not licensed for Milwaukee (A. 135-136, 280-282; GX-66). J. C. Weingarten was given rights to be consulted with respect to new entries in several counties in Texas and Louisiana where it did not then operate stores (GX-57). American Community Stores' request for exclusive rights in Polk County, Iowa (including Des Moines), was refused by the Territory Committee because Eagle Food centers, which operate elsewhere in Iowa, would first have to be consulted (GX-50).

principal executive officers of the various chains. Member chains occasionally resolve their disputes over territory by agreement and then obtain approval for their arrangements from the board of directors (A. 422). For example, "one of the most pressing territorial conflicts" which has confronted the organization was resolved when Penn-Fruit Co. agreed to relinquish its exclusive license in Baltimore to enable Giant Foods, Inc. to serve that market with a full line of Topco-label products (GX-52, A. 412; A. 96, 98, 179, 181). And the board itself has disposed of requests for changes in members' territories after consulting with the affected members or obtaining consent of the member whose territory was to be reduced (F. 44, A. 564; GX-52, A. 412; A. 96, 98).

2. *Customer restrictions.* Topco prohibits its members from selling products supplied by the Association at wholesale unless their membership and licensing agreement permits such sales.[11] On its face, this restriction applies, whether the products are trademarked or not, although Topco's general manager testified that, in practice, the restriction is confined to

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[11] Article IX, Section 8 of the Bylaws (GX-5, A. 398) provides:

> * * * Unless a member's membership and licensing agreement provides that such member may sell at wholesale, a member may not wholesale products supplied by the Association. If a membership and licensing agreement permits a member to sell at wholesale, such member shall control the resale of products bearing trademarks of the Association so that such sales are confined to the territories granted to the member, and the method of selling shall conform in all respects with the Association's policies.

Topco-branded products (A. 153–155). Members who are authorized to sell at wholesale are required to control the resale of Topco trademarked products so as to confine them to specifically designated territories (F. 50, A. 565). All member firms, except five, have agreed to the wholesale restriction (F. 53, A. 565–566). Many members have sought permission from the Board to sell at wholesale and have been either limited to carefully drawn zones or denied permission altogether (F. 50, 52, A. 565). In deciding whether to permit a member to wholesale, the Board consults other members who may be affected by the retail competition which would result (F. 51, A. 565).[12]

[11] On January 10, 1969, after the complaint in this case was filed and shortly before trial, the Topco bylaw relating to member sales at wholesale was amended by the Topco board (DX–31, A. 544; A. 118). As amended, the bylaw provides that a member may sell at wholesale "to retail stores located in any territory in which such member is licensed and in which no other member is licensed." The amended provision continues the prohibition on member sales of Topco label products outside the members' licensed territories. The government views the amended bylaw as a further *per se* violation of Section 1, and so contended in the court below. See *infra*, n. 13, p. 12.

[12] In one case, Hills-Korvette Supermarkets, Inc., a Topco member until 1966, was limited in its sales at wholesale to a single retail customer, B & B Market (Pretrial Stipulation, ¶ 28, A. 16). In another, Pick-N-Pay Supermarkets, Inc., which had previously filed a "notice of intent" to open a store in a county where another member proposed to sell at wholesale, reserved the right to have the sales terminated when its store opened (GX–86–88; GX–29). Requests for wholesale licenses were flatly denied in at least three other instances (Allied Supermarkets, Inc., GX–91; A. W. Cullum & Co., GX–81, GX–68; Giant Eagle Markets, Inc., GX–86–88).

D. PROCEEDING IN THE DISTRICT COURT

1. *The contentions of the parties.* The case was tried on the merits. The government contended that the territorial and wholesale restrictions were horizontal in nature; restrained competition both in Topco products and in the supermarket industry generally; and were thus illegal *per se* under the Sherman Act.[13] The government relied primarily upon the pretrial stipulation (A. 14–25), documentary evidence describing Topco's structure and organization (GX–1–13, GX–15–45, GX–99, GX–104, GX–111–112), and various communications among Topco and its member firms regarding the territorial and customer restrictions (GX–14, GX–46–78, GX–100–103, GX–105–110, GX–113–114).

Defendant contended that the restrictions were necessary and ancillary to its cooperative private label program, and thus permissible under the rule of reason. It relied upon the testimony of its general manager (Fenn, A. 26–126, 209–228), executives from six of its member firms (Cooke, A. 228–251; Davis, A. 251–291; Newman, A. 275–291; Meijer, A. 291–303; Loeb, A. 303–321; Dickelman, A–321–330), and two supermarket merchandising experts (Applebaum, A.

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[13] The government's complaint did not expressly challenge the Topco wholesaling restrictions. Evidence regarding these limitations was, however, received at trial (Pretrial Stipulation ¶¶ 19, 24–31, A. 14–16; GX–11; GX–17; GX–29; GX–40–44; GX–61, A. 423–424; GX–66; GX–86–89; GX–91; A. 50–51, 117–118, 137–139, 141), their antitrust ramifications were fully briefed by both parties, and the district court made findings of fact as to their existence and effect (F. 49–53, 58, A. 565–566).

157–208; Barnes, A. 330–366), as well as additional documents (DX–1–31).

2. *The district court's decision.* The district court entered an opinion (A. 545) and separate findings of fact and conclusions of law (A. 553). Its findings describe Topco's organization and corporate structure (F. 1–18, A. 554–558), Topco's policy and practice of territorial exclusivity (F. 36–48, A. 562–565), and Topco's restrictions upon sales at wholesale by members (F. 49–53, A. 565–566). The court specifically found that exclusive sales territories were allotted to Topco members (F. 36, 40, A. 562–563); that "[m]embers have sought and been denied licenses to sell products supplied by the Association at wholesale" (F. 52, A. 565); and that the agreements "to allocate geographic markets and classes of customers tend to eliminate competition in Topco branded products between Topco members though substantially increasing the members' ability to compete with other chains, national and local" (F. 58, A. 566). It held, nevertheless, that the restraints were legal, concluding that the licensing provisions were not inherently unreasonable, have no substantial adverse effects on competition, and are ancillary and subordinate to the legitimate procompetitive purpose of the Topco organization (Conclusion of Law 4, A. 567).

The court discussed competition in the food industry (F. 19–22, A. 558–559) and the competitive significance of private label products (F. 23–35, A. 560–562). It found that the food distribution industry has become more competitive in recent years (F. 21, A. 559),

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but that there has been a marked concentration among a few national and regional food chains, with a corresponding decline among independent grocers and smaller chains (F. 19, 22, A. 558, 559). The court found that private label products have been the most significant competitive innovation of national mass merchandisers because they confer numerous competitive advantages, including exclusive control over pricing (F. 24, A. 560-561). It concluded that affiliation with an organization like Topco is necessary to achieve effective private label competition with the larger chains (F. 34, A. 562), and that many members would not have joined Topco without assurance of exclusivity in their primary marketing area (F. 35, A. 562). The court also found, however, that the Topco licensing system did not have an appreciable influence on the decision of Topco members to expand (F. 45, A. 564-565); and that the restrictions did not control or affect prices since members are free to sell at whatever price they choose (F. 46, A. 565).

In its separate opinion, the court ruled in effect that the legality of the territorial restrictions should be determined under the "rule of reason" rather than under the *per se* test. It cited the "virtually identical" record in *Sandura Co.* v. *Federal Trade Commission*, 339 F.2d 847 (C.A. 6), a case in which a manufacturers' granting its dealers exclusive territorial distributorships was upheld. (A. 550-551). The court's opinion did not discuss the wholesale restrictions.

## ARGUMENT

### INTRODUCTION AND SUMMARY

The government contends that the challenged practices in which Topco, through its owner-member supermarket chains, has engaged are illegal *per se* under established principles of the antitrust laws. The record shows that Topco owner-members, who are actual or potential competitors, have divided markets geographically among themselves and agreed upon restrictions on sales at wholesale for their mutual economic benefit. These are among practices which this Court long has recognized as illegal *per se*—that is, practices which are condemned by the antitrust laws without examining in detail their particular effects upon competition or competitors.

The district court rejected the *per se* approach, and engaged in a broad "rule of reason" analysis of this case, concluding that the restraints imposed were reasonable. That analysis is incorrect where practices condemned by the *per se* rules are involved, for it involves the "complicated and prolonged economic investigation" which the *per se* rules are designed to avoid. *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5.

The court evidently believed that it was appropriate to permit undisguised market allocation and other mutual restraints among competitors as a means of creating a countervailing force to the competitive strength of others. It therefore characterized Topco's restrictions as reasonable restraints ancillary to the collective effort of its members to compete with the

three major supermarket chains (A&P, Safeway and Kroger), as well as with other individual chains which maintain private labels which they sell exclusively in their stores. These chains, however, developed their exclusive brands as a result of their individual size and (vertically integrated) structure. Their restrictions on private label sales were not the product of (horizontal) agreements among competitors.

This Court has ruled that (vertical) market allocation among retail outlets by a manufacturer who retains ownership of his product is not *per se* illegal. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365. But the Court has distinguished vertical territorial restraints from comparable (horizontal) market allocation among competitors because experience indicates that the latter generally has no purpose other than to restrain competition. *United States* v. *Sealy, Inc.*, 388 U.S. 350, 352. There is no basis to create an exception to the *per se* rule for the particular horizontal market allocation involved in this case since, as the record reflects, the kinds of economic consequences which, in practical experience, have repeatedly justified the *per se* rule are present here.

We contend, then, that there is no occasion for this Court to consider the alleged economic justifications for Topco's practices to determine whether the court below concluded correctly that they were reasonable. Indeed we did not, in the district court, attempt specifically to prove that Topco's practices were illegal under the "rule of reason." The record nevertheless reveals the kind of adverse economic effects which traditionally have justified application of the *per se*

rules. The market allocation has an adverse effect upon competition in Topco-branded products, for only one chain in a shopper's area will, as a general rule, offer those brands. Topco's practices also have an adverse impact generally upon competition in the supermarket industry.

The district court's conclusion that Topco's territorial allocations do not inhibit Topco members from entering competition in another member's territory is clearly erroneous. The record shows that inability to offer the important staple items supplied by Topco is a significant impediment to expansion by chains who would be required, as a result of Topco's restrictions, to procure and maintain a second inventory of such items. Topco's practices thus tend to foreclose chains of significant size from entering new territories, thereby increasing the trend to concentration in local markets. And the record does not support the district court's conclusion that Topco could not remain viable as a cooperative purchasing organization or that its members could not compete meaningfully if the anticompetitive restrictions challenged here were eliminated.

## I. TOPCO'S RESTRAINTS ON COMPETITION, ESTABLISHED BY AGREEMENT AMONG ITS MEMBERS, ARE ILLEGAL *PER SE*.

### A. ALLOCATION OF SALES TERRITORIES

This Court has repeatedly recognized, during nearly 70 years, that agreements by direct competitors to allocate markets among themselves are naked restraints of trade which are illegal *per se* under Section 1 of the Sherman Act because they have "no purpose ex-

cept the stifling of competition." *White Motor Co.* v. *United States*, 372 U.S. 253, 263.[14] This case involves the classic horizontal division of markets which that *per se* rule condemns.

There is no question in this case that, as the district court found, Topco members have exclusive marketing territories for the sale of Topco-branded products (F. 43, A. 564). Nor can there be disagreement that the division of territories involved here is the product of agreement among actual or potential competitors, rather than a restraint imposed upon retail outlets by a manufacturer or producer over whom they have no control. The territorial restrictions are, in other words, horizontal, not vertical.

Topco's members operate at the same level of retail distribution, sell the same classes of food products, market substantially the same Topco brands and are actual or potential competitors wherever their market areas overlap or adjoin. Topco itself is wholly owned

[14] The first case treating horizontal market division as illegal *per se* was *United States* v. *Addyston Pipe & Steel Co.*, 175 U.S. 211, affirming then Judge Taft's opinion in 85 Fed. 271, 291 (C.A. 6). The practices challenged in *Addyston Pipe* were horizontal market division and price fixing. Subsequent cases include: *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593; *United States* v. *National Lead Co.*, 332 U.S. 319, 328 (horizontal territorial allocation and price fixing); see also *Northern Pac. R. Co.* v. *United States*, 356 U.S 1, 5 (tie-in arrangement); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (price fixing, profit pooling and market divisions). Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427 (C.A. 2) (horizontal territorial allocation and price fixing); *Supplement to the Report of the Attorney General's National Committee to Study the Antitrust Laws* 15 (1968).

and controlled by its member supermarket chains (F. 2, A. 554) and is managed by a board of directors, each member of which is also a principal executive officer of his respective chain (F. 17, A. 558). The board assigns territories. Changes of or entry into new territory may take place, as a practical matter, only with the consent of the affected members (A. 72–73). Topco, is, in short, no more than the instrument by which its owner-member supermarket chains effectuate their marketing arrangements.

The means by which competitors divided territories and developed other trade restraints in this case are thus quite comparable to those which this Court held invalid in *United States* v. *Sealy, Inc.*, 388 U.S. 350, this Court's most recent discussion of the application of the *per se* rule to market division by competitors. See, also, *Serta Associates, Inc.* v. *United States*, 393 U.S. 534, affirming *per curiam* 296 F. Supp. 1121 (N.D. Ill.) In *Sealy*, independent companies were given mutually exclusive territorial licenses to manufacture and sell mattresses and bedding products under the Sealy name and trademarks. The licensees, however, were also the stockholders of Sealy, who composed its board of directors and generally controlled the company. This Court—noting that it "has distinguished between horizontal and vertical territorial limitations for purposes of the impact of the Sherman Act" (388 U.S. at 352)—ruled that the restraints were horizontal. It, accordingly, held that the practices of the competing bedding companies, employed through Sealy, were illegal *per se*.

*Sealy* involved price-fixing, as well as market division. The Court held, specifically, that the "aggregation of trade restraints" was unlawful. 388 U.S. at 354. Price-fixing is not at issue in this case. But the decision in *Sealy* did not, in our view, announce that market division alone would no longer be considered a *per se* violation and henceforth would be assessed in terms of its reasonableness in the particular circumstances.

The existence of price-fixing in *Sealy*, as the Court pointed out, refuted the contention that the territorial restraints were employed for legitimate competitive reasons, specifically that they "were mere incidents of a lawful program of trademark licensing." 388 U.S. at 356.[15] That evidence thus strongly confirmed the traditional view that market division among competitors may properly be condemned as *per se* illegal without detailed consideration of its competitive effects. In this case, there is also, as we argue below, ample evidence to confirm the appropriateness of application of a *per se* rule.

The Court also referred, in *Sealy*, to the argument "that a number of small grocers might allocate territory among themselves on an exclusive basis as incident to

[15] The Court noted Sealy's contention that territorial exclusivity served other allegedly legitimate purposes than facilitating price-fixing. 388 U.S. at 356. It also pointed out that Sealy had not appealed from the district court's judgment that it had engaged in illegal price-fixing. 388 U.S. at 355. Price-fixing would thus presumably have been eliminated regardless of whether Sealy was permitted to continue exclusive marketing territories. The Court, nevertheless, did not analyze the market division practices, alone, under a "rule of reason" approach.

the use of a common name and common advertisements, and that this sort of venture should be welcomed in the interests of competition." 388 U.S. at 357. Without expressing a view on the merit of this argument, the Court distinguished the "quite different situation" before it. Here, too, the facts are "quite different," for the 25 members of Topco, with combined sales of more than $2.3 billion, are hardly small grocers. Some are even dominant chains in their area, with 20 to 35 percent of retail grocery sales. And entire blocks of counties and urban areas, in numerous states, are involved, not merely local neighborhoods. The hypothetical situation left open in *Sealy* is simply not presented here.

Our position that *Sealy* did not impair the vitality of the rule that market division by competitors is, by itself, illegal *per se* is also supported by the Court's decision the same day in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365. In that case, this Court held illegal *per se* a manufacturer's contractual restriction on the right of retail distributors, who had purchased its trade-marked bicycles, to sell them where and to whom they wished. It ruled (388 U.S. at 379):

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. * * * Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his

product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale. To permit this would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale. * * *

*Schwinn* thus involved a restriction—vertically imposed upon competing retailers by the producer—which applied after the producer had sold the items to the retailers. The situation in this case is identical in the critical fact that the territorial and other restrictions upon sale of Topco-branded products apply at a time when the retailer owns them.

Indeed, the case for applying the rationale of *Schwinn* is, if anything, stronger here where horizontal, rather than vertical, restrictions are involved. For Topco is merely the instrumentality by which its members cooperatively obtain merchandise and develop restraints upon its resale. Yet the district court simply refused to follow *Schwinn*, stating during the trial that "notwithstanding *Schwinn*," it thought reasonable territorial limitations were lawful (A. 137). Instead, the court relied heavily upon *Sandura Co.* v. *Federal Trade Commission*, 339 F. 2d 847 (C.A. 6) (A. 550), a case which not only involved vertical, rather than horizontal, territorial limitations, but

which, insofar as applied to goods owned outright by the retailer, was overruled by *Schwinn*.[16]

Many of the previous decisions condemning divisions of markets as illegal *per se* are superficially distinguishable from the present case in that there the competitors agreed not to do business at all in each other's territories, whereas here the Topco members agreed only not to sell Topco products outside their exclusive market areas. This distinction, however, is immaterial. For both situations involve the same anticompetitive practice that warrants application of a *per se* rule: competitors by agreement have limited the areas where they will compete, rather than permitting each seller to make his own decision, on the basis of his evaluation of the market factors, where he will do business. Indeed, in *Sealy*, the restraint was only that

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[16] For the same reason, other vertical sales restriction cases cited by appellee in its motion to affirm (pp. 14, 17, 19) are inapposite. See *e.g.*, *Susser* v. *Carvel*, 206 F. Supp. 636 639–640 (S.D. N.Y.), affirmed, 332 F. 2d 505 (C.A. 2), certiorari dismissed, 381 U.S. 125; *Snap-On Tools Corp.* v. *Federal Trade Commission*, 321 F. 2d 825, 827 (C.A. 7); *Denison Mattress Factory* v. *Spring-Air Co.*, 308 F. 2d 403, 406 (C.A. 5). *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F. 2d 398, 406–407 (C.A. 2), certiorari denied, 393 U.S. 938, involved only an issue of fact as to whether the defendant enforced a policy of customer limitations analogous to territorial restrictions.

It has been held that there is a public health exception to the rule of *Schwinn* which permits vertical limitations for products which should be administered only by specialists. *Tripoli Company* v. *Wella Corp.*, 425 F. 2d 932 (C.A. 3), certiorari denied, 400 U.S. 831. Since the district court here found that the restrictions were horizontal and since no public health justification was advanced, discussion of this asserted exception is unnecessary. But cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 459–460.

the Sealy members would not "manufacture or sell 'Sealy products' outside the designated area. A manufacturer could make and sell his private label products anywhere he might choose" (388 U.S. at 352). The recent decisions of this Court are thus entirely consistent with and reiterate the traditional rule that market division among competitors is illegal *per se*; the district court, having found such horizontal restrictions, should therefore have ruled for the government on that basis.

B. CUSTOMER RESTRICTION

Topco's restriction upon reselling at wholesale is also a *per se* violation of the antitrust laws. At the time the government's complaint was filed, Article IX, Section 8 of the Topco by-laws (A. 398, quoted *supra*, n. 11, p. 10) provided that members could not sell any products supplied by the Association at wholesale unless licensed to do so, and that members licensed to wholesale were to control the resale of Topco trademarked products to confine such sales to the members' territories. Shortly before trial this provision was amended to permit any member to wholesale in its own territory, if no other member was licensed there (see n. 11, p. 11, *supra*, DX-31, A. 544; A. 118). In effect, members may now create competition for themselves, but not for each other, by selling at wholesale.

The district court's findings reflect that Topco supplied commodities are purchased outright by the members for resale, and that Topco serves only as a buying and quality control agent, and as a clearing house between members and suppliers (F. 14, A. 557). They

also show that the wholesale restraints have been enforced horizontally, since the Board of Directors administers the wholesale provisions "only after consulting with and giving consideration to the wishes of other affected 'licensee' members" (F. 51, A. 565). These restraints are illegal customer restrictions, for it is firmly established that all agreements restricting the class of customers to which a retailer or wholesaler may sell goods it owns, are illegal *per se.* This is true whether the restraint is imposed by vertical agreement (*United States* v. *Arnold, Schwinn & Co., supra,* 388 U.S. at 379); or, as is the case here, horizontally by arrangements among competitors (see, *e.g., United States* v. *General Motors Corp.,* 384 U.S. 127; *Klor's* v. *Broadway-Hale Stores, Inc.;* 359 U.S. 207).[17]

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The court below, in short, erred by not holding both the territorial allocation among actual or potential competitors and the restrictions on wholesale selling illegal *per se.* In these circumstances, there was no occasion for the court to consider the evidence dealing with the economic consequences of these challenged practices. That evidence, however, reflects the kind of anticompetitive effects which typically accompany practices that are condemned as *per se* illegal, and does not justify the exception to the *per se* rules which the court, in effect, fashioned for the grocery industry.

[17] Although the amended by-law may be less restrictive than its predecessor, it remains a *per se* violation of Section 1. The government is, in any event, entitled to relief against the restraints in force at the time the complaint was filed. Cf. *United States* v. *Concentrated Phosphate Export Assn.,* 393 U.S. 199.

## II. THE SERIOUS ANTICOMPETITIVE NATURE OF THE RESTRICTIVE PRACTICES WHICH THE *PER SE* RULE CONDEMNS CONFIRMS THE APPROPRIATENESS OF APPLYING THAT RULE HERE

### A. TERRITORIAL EXCLUSIVITY PREVENTS COMPETITION IN TOPCO-BRANDED PRODUCTS

Topco's market allocation program amounts simply to a collective, private system of market entry. The membership, through the board of directors, regulates entry into new markets by firms wishing to sell Topco products. The test applied in determining whether to permit new entry is similar to that employed by government agencies in regulating competition under specific statutes—whether the territory in question is being "adequately" served. But the decision is made, not by a disinterested agency, but jointly by officials of firms which are themselves targets of potential competition. And the question whether coverage is "adequate" is determined, not on the basis of public convenience and necessity, but from the standpoint of the economic interests of Topco and its members (A. 64–68, 222–223).[18]

Topco's system thus substitutes the combined judgment of the principal executive officers of competing chains as to what is adequate from the standpoint of their firms' economic interests for the free market process of determining entry. This Court's decisions

[18] The very existence of the territorial restrictions undoubtedly creates a deterrent to formal attempts to enter territory in which a Topco licensee already operates, since potential applicants will be aware that such a licensee normally would not agree to the entry of a new competitor into its area.

have always expressed a deep distrust of such collaboration among competitors to allocate customers or markets, even for a beneficient purpose. Cf. ***Fashion Originators' Guild* v. *Federal Trade Commission*, 312** U.S. 457; ***United States* v. *General Motors*, 384 U.S.** 127.

The conceded purpose of Topco's territorial arrangement is to restrict competition. Defense witnesses uniformly testified that the reason for the territorial scheme was to protect members from competition with respect to Topco products, and to give them exclusive power over the sale of such products in their territory (See, *e.g.*, A. 62, 186, 178, 224–225 242, 317, 352). This testimony was, as the district court recognized, a claim to "monopoly of Topco private label products" (A. 551).

The documents of record similarly reflect this anticompetitive purpose. For example, in 1961, Topco's board of directors rejected a proposed amendment to its by-laws which would have empowered the territory committee to down-grade licenses from exclusive to non-exclusive or co-extensive because it "did not afford the members adequate protection in their prime territories" (GX–52, A. 417). A proposal to develop a second line of brands—to enable other chains to join Topco and enter territories in which members already had exclusive control over the first line—was rejected in large part because Topco members would not agree to giving competitors "equal private brand quality and packaging appeal" that might eliminate their competitive edge under the Topco program (GX–102, A. 440).

The rationale for maintaining exclusivity was candidly explained at trial by Topco's food distribution consultant, Professor Applebaum (A. 186):

> When you have another competitor having the same label that you have, you no longer are in a position of complete freedom to merchandise and promote the way you want, whether it's on a pricing basis or a nonpricing basis even, and if you have built up for yourself in an area an acceptance and he comes in across the street from you and he puts in a store with the label, same products, customers from the same area, all the customers from the same area have to cross the street, he promotes a steak, comes in to buy the steak because it's cheaper and sees the Topco label on the shelf, they buy it over there, they don't buy it from you.

Although Topco does not itself set prices, as the district court found (F. 46, A. 565), the effect of exclusivity is to afford members a degree of freedom in setting prices which they otherwise would not have. It is true, of course, that Topco products face competition from other private, as well as national, brands. The very purpose of establishing a brand, however, is to differentiate a product and thereby insulate it, to some degree, from competition. A. 51–57, 162–169; see Bain, *Barriers To New Competition* 114–115. Thus, because of competitive pressures which tend to force lower price and higher quality, "various food distribution organizations * * * try to differentiate themselves in order to ease some of the pressures of competition in order to get a loyal following" (A. 352).

To the extent that a brand is differentiated from other brands of the same product, then, the retailer who carries that brand exclusively will have relatively more flexibility with respect to its price than one who faces direct competition. Exclusively is sought to achieve this because, as Topco's expert pointed out, sellers of Topco brands could not be relied upon to behave rationally and "lay low * * * so far as price competition is concerned" (A. 184–185).

The role of the private label in retailing emphasizes the significance of exclusivity. The private label is "generally * * * a premium product at a lower price" (A. 350), on which the retailer nevertheless makes a significant profit (F. 24, A. 560). It is important in the development of "an image of being price competitive" (A. 339) which, the experts agree, is the most important of the various factors involved in food retailing (A. 56, 184–190, 336–341, 350–351). Thus, without direct competition in the private label, the retailer may be able to create an image of price-competitiveness with the more expensive national brands, as well as with competing private labels, without reducing his price as low as competition from other sellers of the private label would require. The image of competitiveness which the pricing of private label products promotes, moreover, may carry over to other merchandise whose relative merit is harder for the housewife to assess (A. 336).[19] Topco's restrictions

[19] The district court stressed the importance of brand loyalty as a reason why Topco members justifiably demanded exclusivity (A. 551, 561). The extent to which brand loyalty is a principal factor in shopping habits, however, cannot be deter-

thus strike at the very heart of the competitive system—price. *United States* v. *Container Corp.*, 393 U.S. 333; *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150.

### B. TOPCO'S RESTRICTIONS INHIBIT EXPANSION BY ITS MEMBERS INTO OTHER MEMBERS' MARKETING TERRITORIES

Topco members may, under its licensing system, expand into the exclusive territory of another member by using brands other than those procured by Topco.[20] The court below erroneously concluded that the inability to use Topco products "does not have an appreciable influence on the decision of Topco members as to whether or not to expand" (F. 45, A. 564–565). A large number of the products which Topco supplies its members are strategic staple items, such as canned goods, frozen goods, and beverages. If a store cannot sell Topco brands for these items, it must replace them with comparable merchandise. It is, however, extremely difficult, as Topco itself recognizes, for chains to procure, warehouse and distribute a com-

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mined because there are not enough marketing studies to answer the question (A. 186–187). Price and quality are undoubtedly the most fundamental consideration and the competitive price of a brand of known quality may, with other factors, induce a consumer to patronize a certain store (A. 56, 184–190, 336–341; 350–351).

[20] Topco's expert, Professor Applebaum, testified that supermarket chains employ a number of different strategies of *de novo* expansion: step by step "pushing out like fingers" from a prime market area; simultaneous entry at a few strategic spots in as many metropolitan markets as possible, subject to deeper development later; full scale establishment in a few large urban centers; and "leap frogging * * * over large territories" (A. 181–182). All of these strategies are available to Topco's members.

plete second line of the many items Topco supplies for their unlicensed stores. The president of Penn-Fruit, for example, then serving as Topco's board chairman, reported to a special meeting on the problems of territorial conflicts and expansion in 1961 that "it is usually very difficult for a member to sell under the Topco brands in less than all of its stores, because of the problems of warehousing, procurement, etc." (GX-52, A. 412). Similarly, a special Topco committee that studied the possibility of establishing a second private brand concluded: "In the case of existing Members on strong deterrent to such demand doubtless lies in the fact that it is impracticable to stock in the same warehouse duplicating private brands inventories" (GX-102, A. 438-439).[21]

Topco's expert also conceded that there is an operating "handicap" to any member who cannot stock Topco brands, which is an obvious deterrent to expansion (A. 191-192, 207-208). Thus, only five percent of the 1000 stores owned by Topco members are operated outside of licensed territory; and, as the district court found, these few stores generally are "located in areas which could not, because of the distances involved, be adequately served by the member's warehouse facilities. Most of the unlicensed outlets are leased departments in discount or department

[21] These candid contemporaneous documents demonstrate the district court's error in finding that the territorial restrictions do not affect expansion by members. Cf. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396.

stores, and are not independent supermarkets" (F. 57, A. 566).[22]

The ultimate effect of the restrictions on expansion that result from an inability to sell Topco products is to intensify the trend toward concentration in local markets (A. 233, 267–269, 288, 301); cf. *United States* v. *Von's Grocery Co.,* 384 U.S. 270. The district court expressly found that "[t]here has been a marked concentration of economic resources and retail outlets among a few of the most powerful national and large regional food chains while independent grocers and smaller chains have disappeared at an accelerating rate." F. 22, A. 559. This trend has been largely the result of the supermarket movement and the development of chains and affiliated groups of stores. ***Organization and Competition in Food Retailing,*** Technical Study No. 7, National Commission on Food Marketing, Ch. 2 (DX-1, A. 468–474).[23] Elimination of firms as substantial as

[22] For example, American Community Stores operates 77 stores. Of these, 43 are operated with Topco products, principally in Nebraska and Western Iowa. The remainder, which are scattered in eight other states and Puerto Rico, are so far from their distribution center in Omaha, that they are supplied from local sources. (A. 278, 280).

Members sometimes expand by acquisition and operate the acquired group of stores without the Topco label. A. W. Cullum, for example, which is licensed in Texas, operates, without Topco products, a chain of stores in Los Angeles, which it acquired (A. 66, 90).

[23] The Food Marketing Commission characterized Topco as "a further concentration within the chain segment of food retailing rather than an example of a cooperative group of independents" (A. 483). The government does not here question the legality of cooperative buying efforts by firms the size of Topco's member

Topco's members from the role of potential entrants into particular territories is particularly serious in such circumstances.[24] Cf. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651; *United States* v. *Penn Olin Co.*, 378 U.S. 158. For removing them facilitates the development of an essentially oligopolistic market structure from which "the likelihood [is] that parallel policies of mutual advantage, not competition, will emerge." *United States* v. *Alcoa*, 377 U.S. 271, 280. See Bain, *Industrial Organization* (2d ed.), 28–31, 112–162, 306–332; Stigler, *The Organization of Industry*, ch. 5.

## III. THE DISTRICT COURT ERRED BY APPLYING A "RULE OF REASON" ANALYSIS

1. The district court rejected the government's *per se* theory and applied a "rule of reason" approach. It held, in essence, that Topco's restrictive practices

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chains which may itself result in some concentration. We challenge only the allocation of territories which, as a practical matter, forecloses *de novo* market entry, thereby further increasing concentration.

[24] Topco members in fact have very significant market shares in many areas. Data compiled from exhibits (GX–85 and GX–104, A. 442) as to which it is conceded that market share data might be calculated (Tr. 515) show that Topco members are substantial factors in their respective market areas. These figures understate actual market shares, however, because they are computed on the same basis as Topco licensing countywide. On this understated basis, eight members had more than 12 percent each of the market in licensed counties. Estimated shares of particular markets were higher. Some are even a dominant chain in such areas, with shares ranging from 15 to 35 percent of total retail sales. (A. 418; GX–14, GX–50, GX–52, A. 266–267, 288–289.)

were valid because they were "reasonable and in the public interest" (A. 567). It balanced the asserted advantages and disadvantages to competition of Topco's practices, concluding that any anticompetitive effects of these practices are "far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories" (A. 553).

A rule of reason analysis, involving a specific inquiry into the economic facts of an individual case, is not applicable where a *per se* violation is involved. The *per se* rules rest upon the experience of practical men, which teaches that certain agreements or practices, as a class, have such a "pernicious effect on competition and lack of any redeeming virtue" that there need be no "elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5.

The *per se* rules contribute both to judicial economy, by simplifying the issues and the inquiry, and to economic stability, by providing reasonable certainty and predictability in the application of antitrust law to the conduct of business. The alternative, in the words of Chief Justice (then Circuit Judge) Taft in *United States* v. *Addyston Pipe Co., supra,* is for courts, as the court did here, to "assume * * * the power to say, in respect to contracts which have no other purpose and no other consideration on either side than mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not." 85 Fed. at 283–284.

Without the *per se* rules, courts would be required to engage in "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pac. R. Co. v. United States, supra,* 356 U.S. at 5.

The district court also concluded that Topco's restrictive practices "are ancillary and subordinate" to legitimate pro-competitive purposes (A. 567). The apparent reliance on the common law doctrine of ancillary restraints adds nothing to the analysis of this case. That doctrine is simply a specific application of the "rule of reason." Under the doctrine, a covenant in partial restraint of trade, which is ancillary to a contract's main lawful purpose is lawful, but only if the restraint does not "exceed * * * the necessity presented by the main purpose of the contract." *United States v. Addyston Pipe & Steel Co.,* 85 Fed. 271, 282 (C.A. 6), affirmed, 175 U.S. 211. The doctrine traditionally has been employed in narrow contexts, such as employment contracts or sale of a business, where it was deemed legitimate to impose restraints, for limited duration and territory, upon competition by a seller or employee. In this case, the restraints are not limited in time or place, but broadly apply to prevent sale of Topco brands at all times wherever a store is not licensed to sell them. Analysis under a necessarily expanded doctrine of ancillary restraints and under the rule of reason would thus be identical.

2. The district court erred, in any event, by concluding that Topco's territorial limitations are necessary to effective competition with giant supermarket chains which are sufficiently large to maintain their own private label program, and that elimination of those restrictions "would result in the demise of the Topco organization" (A. 553). There is no reason why an effective program cannot exist without exclusivity, despite the contrary protestations of Topco executives (A. 562).

The only consequence of elimination of exclusive territories (as the testimony of Topco's expert, Professor Applebaum, makes clear) is to subject Topco stores to pricing and merchandising competition in those products (A. 184–186). Yet this is no more than Topco members now face with respect to national brands (A. 187–189, 198–199). The record, moreover, shows numerous instances in which Topco members have competed with each other in Topco products without significant disadvantage to themselves or to Topco's private label program.[25]

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[25] For example, despite testimony by the president of Schultz Sav-O Stores that the loss of exclusivity in its territory would be "a damaging thing" (A. 329), Schultz wholesales Topco products to other grocery retailers in its territory ($10 million in 1967) and advertises them in the same daily newspapers as its retail competitors (GX 128; GX 132); yet its sales increased from $28.8 million in 1964 to $43.9 million in 1967 (A. 21). Both A. W. Cullum and Allied Supermarkets sold Topco brands at wholesale in areas where they had retail markets (GX 18; GX 68; Pretrial Stip. ¶22, 26, 30; Tr. 660, GX 41, A. 15, 16). In Spokane, Washington, Fred Meyer wholesales Topco brands and also retails them, often advertising them in the same papers as its competitors (GX 116–GX 123). In Baltimore, Giant and Penn-Fruit competed against each other in the

There is, moreover, serious doubt whether Topco members would abandon Topco if the territorial restrictions were eliminated. The court found that "[t]he only way that chains the size of Topco members can obtain volumes necessary to achieve effective and economically feasible private label competition with the larger chains is to become affiliated with a buying organization" (F. 34, A. 562). The alternative to a non-exclusive system of private brands is thus likely to be no private brands at all.[26] Thus, to the extent that lower-priced, private brands are necessary competitive items, most members would presumably be compelled to continue with Topco, even on a non-exclusive basis. Indeed, the success of that organization's limited experience with competition among members indicates that non-exclusive territories would not cause the demise of the Topco private label system.

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sale of Topco products until Giant left the Topco organization in 1966 (A. 179, 181). Penn-Fruit operates discount stores under the name "Dale's" in Philadelphia, which compete directly at different prices, with its own "Penn Fruit Stores" (A. 245–246). In Dallas, Monarch and Tom Thumb Stores advertise competing Topco brands (GX 126–127). Plum's, whose prime territory was Muskegon, Michigan, and Meijer's, whose prime territory was Grand Rapids, extended into each other's cities and ended up "competing all over the place" (A. 297). Yet Meijer's sales rose from \$45 million in 1964 to \$119 million in 1966 (A. 20, 298). Finally, Topco's New Member Development Program contemplates that if Topco cannot obtain a large chain in a given metropolitan area it will attempt to get several smaller ones to work together with Topco brands (GX 99), *i.e.*, to compete with each other without exclusivity.

[26] Even if the larger Topco members attempted to establish their own limited private label programs, Topco's expert Dr. Barnes concluded that, "they would incur costs that are many times the cost of the Topco operation to the members" (A. 343).

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## CONCLUSION

For the reasons stated, the judgment of the district court should be reversed, and the case should be remanded for entry of an appropriate decree.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

October Term, 1971

No. 70-82

UNITED STATES OF AMERICA,
*Appellant,*

vs.

TOPCO ASSOCIATES, INC.,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

## BRIEF FOR TOPCO ASSOCIATES, INC.

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